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CITATIONS

Cases:

Corn Products Refining Co. v. *Federal Trade Commission*, 324 U.S. 726 — 6

Federal Trade Commission v. *Klesner*, 280 U.S. 19 — 7

Federal Trade Commission v. *Raladam Co.*, 316 U.S. 149 — 8

Federal Trade Commission v. *Standard Education Society*, 302 U.S. 112 — 6

Jacob Siegel Co. v. *Federal Trade Commission*, 327 U.S. 608 — 7

Standard Distributors Inc. v. *Federal Trade Commission*, 211 F. 2d 7 — 7

Statute:

Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45:

Section 5 — 2

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Section 5(b) — 2–3

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 881

EXPOSITION PRESS, INC., AND EDWARD CHLAN,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17–32) is reported at 295 F. 2d 869. The opinion and order of the Federal Trade Commission (App. 11a–18a)[1] have not been officially reported.

JURISDICTION

The final decree of the court of appeals, denying the petition to review and enforcing the Commission's order, was entered on November 28, 1961 (Pet. App. 33–34). On February 17, 1962, the time for

[1] "App." refers to petitioners' appendix in the court of appeals and "Comm. App." refers to the Commission's appendix in that court.

filing a petition for a writ of certiorari was extended to April 20, 1962, by Mr. Justice Harlan. The petition was filed on April 17, 1962, and was served on April 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there is substantial evidence in the record to support the finding by the Federal Trade Commission that petitioners' advertisement that it would pay authors "40% royalties" on books it published for them was deceptive.

2. Whether the Commission could properly conclude that its issuance of a complaint against petitioners would be in the public interest.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in pertinent part:

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (a)(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if

it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue * * * a complaint * * *.

STATEMENT

On May 15, 1959 the Federal Trade Commission issued a complaint against the petitioners, Exposition Press, Inc., a "subsidy" or "vanity" publisher, and Edward Uhlan, its president. Such a publisher receives most or all of the expenses of publishing a book from its author. The complaint alleged that the petitioners were "in substantial competition in commerce with other corporations," that they had represented that they "pay their authors a 40% royalty on books published and sold by them" and that such statement was "false, misleading and deceptive [because] * * * respondents do not pay their authors a 40% royalty or any kind of royalty" (App. 3a, 4a). In their answer, petitioners admitted that they were in competition with other publishers and that they had represented that they paid a 40% royalty to their authors, but denied that such a representation was false and deceptive (App. 7a). The petitioners also asserted an affirmative defense of *res judicata* based on a prior Commission proceeding against them which had resulted in a consent decree entered in November 1957 (*ibid.*).

At the hearing the Commission introduced into evidence an advertisement which the petitioners had inserted in various newspapers and magazines, in which authors were invited to write for two free brochures explaining "how to publish your book, get 40% royal-

ties * * *."[2] Officials of various publishing houses testified that "royalties" meant payment or compensation paid to the author for the right to publish his work, customarily based upon a percentage of the retail sales price;[3] that petitioners' use of the word "royalties" was incorrect, since the advertisement did not disclose that the author would have to pay the cost of publication;[4] and that as the term is used in the trade, a 40% royalty is not economically possible.[5] Three professional authors and seven non-professional authors who had dealt with petitioners testified that this advertisement would not disclose the fact that the author would have to pay to have the book published.[6] Petitioner Uhlan testified that, for over ninety percent of the books published by his company, the "royalties" paid to the authors were less than the amounts

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[2] The advertisement read in full:

"Free to Writers seeking a book publisher—Two fact-filled, illustrated brochures tell how to publish your book, get 40% royalties, national advertising, publicity and promotion. Free editorial appraisal. Write Dept. STM-3—EXPOSITION PRESS/386 4th Ave., N.Y. 16."

[3] Emanuel Harper (Comm. App. 10a), Seymour Turk (Comm. App. 8a), Eugene Kelly (Comm. App. 12a), John McCallum (Comm. App. 4a).

[4] John McCallum (Comm. App. 7a).

[5] Eugene Kelly (Comm. App. 14a), George Schieffelin (Comm. App. 16a).

[6] John Brick (Comm. App. 28a–29a), Charles Gorham (Comm. App. 31a–32a), Helen Hull (Comm. App. 34a), A. L. McMillan (App. 64a), Carl Collins (Comm. App. 19a), Margaret Royall (Comm. App. 21a), Elmer Smith (Comm. App. 22a–23a), Janie Claytor (Comm. App. 23a–24a), Robert L. Scribner (Comm. App. 24a–25a), William W. Cleere (Comm. App. 25a–26a).

advanced by them for the publication of their books (Comm. App. 17a–18a).

After full hearings, the hearing examiner found that petitioners' advertisement was deceptive and issued an order prohibiting use of the term "royalty" to describe any payment made to an author based on sales of the author's book, until the author had been repaid all amounts advanced by him for publication of the book. The Commission affirmed the examiner's decision, but vacated his order as inappropriate.[1] The Commission's order prohibited petitioners from representing that "* * * they will make payments to an author based on sales of the author's book unless a disclosure is made in immediate conjunction therewith that such payments do not constitute a net return to the author but that the cost of printing, promoting, selling and distributing the book must be paid in whole or in substantial part by the author" (App. 11a). The Commission's order was affirmed by the Court of Appeals for the Second Circuit, with Judge Friendly dissenting (295 F. 2d 869).

ARGUMENT

Petitioners' principal contentions are (1) that the evidence does not support the Commission's finding that their advertisement was deceptive, and (2) that

[1] The Commission vacated the hearing examiner's order because under it "the term 'royalty' could not be used to describe a payment made to an author of a percentage of the retail price of his book even though the author was put on notice that he would have to pay a subsidy which would not be recovered until a certain number of his books were sold" (App. 14a).

any deception was so insignificant that the issuance of the complaint was not in the public interest. The court of appeals correctly rejected both of these contentions. In any event, they present factual questions that have no importance beyond the present case, and do not warrant review by this Court.

1. This Court has recognized that great weight must be given to factual inferences drawn from the evidence by the Commission (*Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 739). As the Statement, *supra*, shows, there was sufficient evidence to support the Commission's finding that petitioners' advertisement had "the tendency and capacity to mislead and deceive a substantial portion of the purchasing public" (App. 10a). This conclusion is not undermined by the knowledge of persons professionally connected with the publishing field that a 40% "royalty" would necessarily entail underwriting of the publisher's expenses. As this Court has stated, the fact that "a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced" (*Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 116). It is also immaterial that only the initial advertisement was deceptive, since, as the court below held, it was permissible for the Commission to infer "that Exposition by its misleading initial approach attracted business which it would not otherwise have obtained" (Pet. App. 22–23).

2. Petitioners' claim (Pet. 6–8) that the filing of the complaint against them was not in the public

interest similarly presents no important question. "In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion." *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 28; see, also, *Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F. 2d 7, 11 (C.A. 2). The court of appeals carefully considered the claim that "this violation was too trivial * * * to warrant Commission action," but correctly concluded that, in view of the considerations justifying the Commission's decision to proceed, "there is sufficient public interest in preventing Exposition's deceptive advertising to justify our enforcement of the Commission's order" (Pet. App. 23-24).

3. Petitioners' two other contentions are equally insubstantial. (a) The attack on the scope and definiteness of the order (Pet. 14-15) was fully answered by the court of appeals. Noting that the Commission "has wide discretion in framing its order" (see *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611), the court stated (Pet. App. 24): "The violation consisted in representing that the author's share of sales receipts is income to him, free and clear, and no alternative formula has been suggested which would remedy the likelihood of such misrepresentation." (b) Since the advertisement here in question was not involved in the prior Commission proceeding against petitioners in 1957 and was not used by them until after that proceeding was completed (Comm. App. 9a-10a), the defense that the consent order entered therein was *res judicata* of the issues in the present case was properly rejected. Cf.

Federal Trade Commission v. *Raladam Co.*, 316 U.S. 149, 150–151.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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